QUARTERLY REPORT

OF THE

ATTORNEY GENERAL

OF

ALABAMA

For the Period

July 1, 1946

Through September 30, 1946

Volume 44

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from July 1, 1946, through September 30, 1946.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

WILLIAM N. McQUEEN,

Attorney General.

OPINIONS

July 9, 1946.

Hon. Wm. J. Kern,

Ex officio Clerk,

Inferior Civil Court,

Mobile County,

Mobile, Alabama.

Inferior Civil Court of Mobile—Sheriffs fees in unlawful detainer proceedings—Title 31, Sections 35 et seq.; Title 31, Section 45; Title 7, Sections 964 et seq.; Title 11, Section 34, Code of Alabama 1940.

Sheriffs' fees in Inferior Civil Court of Mobile in unlawful proceedings discussed.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of January 12, 1946, is as follows:

"I respectfully solicit your opinion as to the following: Title 11, Section 34, 1940 Code of Alabama allows Sheriff $5.00 for executing Writs of Possession of Unlawful Detainer Proceedings; and $1.50 for serving process in such proceedings.

"Title 13, Section 45, 1940 Code of Alabama fixes Sheriff Fees for serving Unlawful Detainer process at $1.00 and for executing Writ of Possession at $2.00—applying particularly to House Bill 413 (Sanderson Act) approved 10/25/32.

"Title 54, Section 18, 1940 Code of Alabama makes an exception as between Fees for Constables and Sheriff's in Unlawful Detainer proceedings; Re; Trap-vs-State, 122 Ala. 394, 25 So. 194.

"Please enlighten me as to which are the correct Sheriff Fees that I as Ex Officio Clerk of the Inferior Civil Court of Mobile should charge in such cases."

The Inferior Civil Court of Mobile was established on April 15, 1911, by Local Act No. 312, Local Acts 1911, page 274. This inferior court is a court established in lieu of a justice of the peace court.

It is provided in Section 8 of the Act as follows:

"Section 8. . . . . For the execution of all process issued out of said court the sheriff shall receive fees as fixed by Section 3722 of the Code of Alabama of 1907."

The local act establishing the Inferior Civil Court of Mobile, therefore, specified the Code section which establishes the fees which the sheriff should receive in that court. Section 3722 of the Code of 1907 now appears as Title 11, Section 34 of the Code of Alabama 1940. This section allows the sheriff a fee of five dollars for executing a writ of possession and a fee of one dollar and a half for "serving a summons and making return in cases of forcible entry and detainer and unlawful detainer." It is my opinion that since the local acts establishing the Inferior Civil Court of Mobile specifies that the sheriff shall execute the process of the court and since said local act also specifies the Code section under which the sheriff is paid, that he should receive the fees set out in Title 11, Section 34, Code of Alabama 1940. When he executes a writ of possession in unlawful detainer suits and when he serves summons and makes return in cases of forcible entry and detainer and unlawful detainer he should receive five dollars and one dollar and a half respectively. The above fees are applicable to forcible entry and unlawful detainer proceedings brought under the provisions of Title 7, Sections 964 et seq., Code of Alabama 1940.

It is further my opinion, however, that in a proceeding for "possession wrongfully withheld" brought under the provisions of Title 31, Sections 35 et seq., Code of Alabama 1940, that the sheriff should receive fees as prescribed by Title 31, Section 45, Code of Alabama 1940. The fees specified in that section are the same for the sheriff and the constable, and are in the amount of one dollar for serving the original writ of possession and return, fifty cents for receiving counter-affidavit and returning same and two dollars for executing the writ of possession or judgment by placing the plaintiff in possession.

In conclusion you are advised, therefore, to first determine whether the suit for possession is brought under the provisions of Title 7, Sections 964 et seq., Code of Alabama 1940, or whether it is brought under Title 31, Section 45, Code of Alabama 1940. For the distinction see **Garrett v. Reid,** 13 So. 2d. 97, Supreme Court of Alabama, April 15, 1943.

If the proceedings are under Title 7, sheriff's fees should be taxed under Title 11, Section 34, Code of Alabama 1940. If proceedings are brought under Title 31, his fees are allowed in accordance with Title 31, Section 45, Code of Alabama 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 29, 1946.

Hon. Gordon Persons, President,

Alabama Public Service Commission,

Montgomery 1, Alabama.

Gen. Acts 1945, p. 414, § 1(B)—Air Commerce—Alabama Public Service Commission—

1. Ambulance service furnished by use of aircraft is subject to regulation by the Alabama Public Service Commission.

2. Air photography, crop dusting, "skywriting," and aerial survey of properties, accomplished by use of aircraft are not subject to regulation by the Commission under Act No. 269, H. 302, approved July 7, 1945 (Gen. Acts 1945, p. 414).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 13, 1946, is as follows:

"The last session of the Legislature passed an Act, No. 269 (H-302) to provide for the regulation of air commerce in the State of Alabama by the Public Service Commission.

"Section 1, Paragraph B of the above Act reads as follows:

"'"Air Commerce" means the carriage by aircraft of persons or property, or any class or classes thereof, for compensation or hire in intrastate commerce in this State, including such aircraft operations of carriers by rail, water, or motor vehicle, and/or express or forwarding companies except pilot training, flight instructions, sale of property, and services for aircraft, engines, and accessories.'

"You will note that a few certain types of operations are specifically exempt from our jurisdiction.

"There are in Alabama today aircraft operations embracing air photography, crop dusting, air ambulance, advertising known as 'Sky-Writing', aerial surveys of properties and other similar services.

"The question arises as to whether or not the types of services mentioned previously, namely; Air photography, crop dusting, air ambulance, 'Sky-Writing' and aerial survey of properties, come under the jurisdiction of the Public Service Commission, as the Act does not exempt them. An air ambulance certainly includes the 'carriage of persons and property.'"

In my opinion "air ambulance" service is within the scope of "air commerce" as defined in bracket (B) of Section 1 of Act No. 269, H. 302, approved July 7, 1945 (General Acts 1945, p. 414) and, therefore, subject to regulation by the Commission. The various provisions of the Act relating to regulation of air commerce, so defined, are appropriate and applicable to ambulance service furnished by "aircraft" as defined in bracket (B) of said Section 1.

The other services, however, above enumerated in the concluding paragraph of your letter, viz: air photography, crop dusting, "sky-writing" and aerial survey of properties, do not, in my opinion, come within such statutory definition of "air commerce," and are not, therefore, subject to regulation by the Commission under the Act in question, although they are not specifically exempted from regulation. It is sufficient that they do not fall within the requirements of the statutory definition, "carriage by aircraft of persons or property *** for compensation or hire." Such activities are services merely furnished by means of aircraft, but lacking the other necessary elements of "air commerce" as defined in the Act.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 29, 1946.

Hon. A. R. Meadows, Superintendent,

Department of Education,

Montgomery 4, Alabama.

Gen. Acts 1945, p. 479—School Teachers—Examination for Tuberculosis—Religious Beliefs—

All teachers, irrespective of religious beliefs, are subject to the provisions of Act No. 289, S. 108, approved July 7, 1945, and required to submit to the physical examination thereby prescribed for detection of tuberculosis in an infectious stage as a condition to employment as teachers.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 22, 1946, is as follows:

"At the insistence of Dr. L. Frazer Banks, Superintendent of Birmingham City Schools, I am asking your opinion on questions submitted by him.

"Miss Sarah N. Dryer, regularly employed by the Birmingham City Board of Education and having continuing service status with said board, is asking to be allowed to continue her teaching without being required to take the new compulsory X-ray test for tuberculosis on the ground that it is contrary to her religious beliefs. What procedure should the Birmingham City Board of Education follow in settling this case?

"I am enclosing all data submitted by Dr. Banks on this case. Your answer to the question will be appreciated."

Section 1 of Act No. 289, S. 108, approved July 7, 1945 (Gen. Acts 1945, p. 479) is in part as follows:

"It shall be unlawful for school authorities to employ teachers, janitors, food handlers or bus drivers who have tuberculosis in an infectious stage. Every board of education shall require a physical examination for tuberculosis, including adequate laboratory tests and x-rays, of all such employees of the board at least once in three years and shall cause physical examination to be made within one year from the date this act becomes operative. Such examinations, tests, and x-rays shall be made by the several county health departments; or an employee may be examined at his own expense by any other duly licensed doctor of medicine who is a specialist in the treatment of the disease of tuberculosis of his own choosing."

Said Act, in my opinion, is a valid exercise of the police power in the interest of the public health, and not in conflict with any provisions of the State or Federal Constitution. The Act does not purport to exempt any class of persons from its application, and there is, in my opinion, no basis for any implied exemption. It must be held to apply to all persons coming within the field of its operation irrespective of religious beliefs.

It is, therefore, in my opinion, the duty of the county boards of education to observe the requirements of the Act without regard to religious beliefs of those persons who by its terms are expressly subject thereto.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 29, 1946.

Hon. F. A. Brotherton,

Commissioner of Finance,

Walker County,

Jasper, Alabama.

Municipal Corporations—Code 1940, Tit. 51, § 2(k)—License Taxation—State and County Fairs—

Municipal corporation may impose license taxes on (1) sales and services, other than sales of live stock, farm products and implements; and (2) games, amusements, shows, displays and exhibits, other than shows, displays and exhibits of agricultural implements, farm products and live stock, although such activities are carried on by or in connection with State and county fairs, or by corporations organized under Code 1940, Tit. 10, §§ 124, et seq., or under Code 1923, §§ 7167, et seq., as amended (Acts 1927, p. 83).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of July 15, 1946, is as follows:

"Paragraph (K) of Section 2 of Title 57 of the Code of 1940 provides that no license shall be collected or required to be paid to the state or any municipality by state or county fair, etc.

"Section 597 of the same title provides for a license to be paid to the state for state fair or carnival by state, county, district or agricultural fairs operating with midway, carnivals or vending concessions.

"In 1934 the members of the Jasper Chamber of Commerce passed a resolution electing trustees to organize a corporation under Section 7167 of the Code of 1923 as amended by General Acts of 1927, page 83. Thereafter the parties named as trustees by the Chamber of Commerce undertook to organize Walker County Fair Incorporated by filing articles of incorporation reciting that the corporation was being formed for the purpose of promoting knowledge in agriculture, etc., and not for profit either to the corporation itself or the trustees.

"Walker County Fair Incorporated has been holding so-called county fairs and has been having the usual carnivals, midways, concessions and state fairs on the fair grounds. Charges have been made for admission to the fair grounds and all the shows in the carnival or midway have charged admission fees.

"The Board of Commissioners of the City of Jasper would like to have your opinion on the two questions noted below:

"1. Was Jasper Chamber of Commerce such a society as could authorize the organization of a corporation for the purpose of conducting state fairs under Section 7167 of the Code of 1923 as amended by the Acts of 1927 above cited?

"2. Is Walker County Fair Incorporated, which was organized under resolution of the Jasper Chamber of Commerce, a county fair within the meaning of Paragraph (K) of Section 2 of Title 1, of the 1940 Code, and, therefore, exempt from municipal license by the City of Jasper?"

Paragraph (k), Code 1940, Title 51, § 2, purports, among other things, to exempt from municipal license tax state and county fairs, agricultural associations, stock, kennel and poultry shows, etc., and concludes with a sentence reading as follows:

"Nothing contained in this subsection shall be construed to prohibit any municipality, county or state, from imposing any license tax upon or for the privilege of engaging in the business of supplying services for hire or reward, or selling commodities other than live stock, farm products or farm implements, or conducting or operating devices or games of skill or amusements or other games or devices, or conducting or operating shows, displays or exhibits other than shows, displays, or exhibits of agricultural implements, farm products, live stock and athletic prowess."

This proviso, in my opinion, negatives any intent to prohibit such license taxes upon the activities above enumerated, although they may be conducted by or in connection with, or under the sponsorship of such fairs, whatever form of association, corporation, or organization may be engaged in such activities or operations. In other words a municipality is authorized to impose a license tax upon all activities or operations, not specifically excepted above, to-wit: (1) sales and services, other than sales of live stock, farm products and implements; (2) games, amusements, shows, displays and exhibits (other than shows, displays and exhibits of agricultural implements, farm products, and live stock); although such sales, services, games, amusements, shows, displays and exhibits may be conducted by a corporation heretofore organized under Code 1923, §§ 7167, et seq. as amended (Code 1940, Tit. 10, §§ 124, et seq.), such as the Walker County Fair, Incorporated, purports to be. The material inquiry is not what kind of corporation or legal entity may operate, sponsor or conduct the aforementioned activities, but the nature and description of the activities themselves so conducted.

Code 1940, Title 51, § 597, relates only to State and county license taxes, and need not therefore be considered.

The result is to make it unnecessary or inept to undertake to answer categorically your questions numbered (1) and (2), except to say that to the extent the corporation in question operates or conducts the activities expressly exempted under Title 51, § 2(k) it is exempt from municipal license tax; and to the extent it operates non-exempt activities it is subject to such tax as may be imposed by municipal license ordinance or ordinances.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 29, 1946.

Hon. Ben C. Morgan,

Director of Conservation,

Montgomery 4, Alabama.

Code 1940, Title 8, Section 107

1. Game wardens are without authority to forcibly search game bags, hunting coats, etc. unless in possession of duly issued search warrant.

2. Director of Conservation authorized to promulgate rule regulating the carrying of game within the State, including a rule providing for the inspection of game bags, hunting coats, etc. by duly identified officers of the department.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of July 16, 1946, is as follows:

"Section 107 of Title 8, 1940 Code of Alabama, provides that all game birds or game animals taken or killed in this State must at all times be carried or transported openly, and the failure to do so shall constitute a misdemeanor, punishable by a fine of not less than $10.00.

"Our Game Wardens are frequently refused permission to inspect game bags, hunting coats, and other receptacles in which game birds and game animals are kept by hunters after they have been killed or captured. I am under the impression that the above cited section would require all hunters to permit officers of this Department to inspect game bags, hunting coats, etc., to insure that a game law has not been violated.

"I would like to know what recourse one of our officers would have should a hunter refuse permission to inspect a game bag or hunting coat. I should also like to know if, in your opinion, a regulation duly promulgated by me as Director of this Department requiring all game bags, hunting coats, etc., to be subject to the inspection of officers of this Department upon proper identification would be legal.

"Your usual prompt attention in handling such matters will be deeply appreciated."

Your request for an opinion presents two questions for determination. First, you inquire as to what recourse one of the officers of your department has in the event he is refused permission by a huntsman to inspect a game bag or hunting coat. Secondly, you inquire as to your authority, as Director of the Department of Conservation, to promulgate a rule or regulation re-

quiring all game bags, hunting coats, etc. to be subject to inspection by officers of your department upon proper identification of said officer.

It is my opinion that under the present statutes there is no action that your officers may legally take against persons refusing to allow inspection of their game bags or hunting coats, unless said officer is acting under the direction of a properly issued warrant directing the search or arrest of said person.

It should be pointed out that this opinion is written under the assumption that the officers mentioned in your letter are acting without a warrant directing the search or arrest of the person being inspected.

The Code section quoted by you in your letter (Title 8, Section 107, Code of Alabama 1940) merely imposes a duty upon the hunter, or other person, transporting or carrying game within this State and does not incorporate therein the right of inspection by officers of your department. Therefore, no right of inspection is conferred upon your officers by virtue of this statute.

Title 8, Section 46, Code of Alabama 1940, constitutes the Director of Conservation, his wardens, agents and employees peace officers of the State of Alabama.

Section 51 of this same Title of our Code provides that all enforcement officers and inspectors employed by the Director of Conservation are clothed with the power and authority of deputy sheriffs, including the right of arrest without warrant.

It, therefore, appears that the officers of the Department of Conservation are duly constituted peace officers of the State, and furthermore are clothed with the same authority as deputy sheriffs insofar as said authority pertains to the right of arrest and search of violators of the game laws of the State.

However, it is my opinion, that this does not empower officers of your department to arrest and search persons merely suspected of violation of the Code section in question (Title 8, Section 107), inasmuch as it is specifically provided that violation of said Section shall constitute a misdemeanor only.

Title 15, Section 154, of the 1940 Code sets out the conditions and circumstances under which an officer is authorized to arrest a person without warrant. Our judicial decisions are uniform to the effect that an officer may not arrest a person for a misdemeanor without a warrant, unless the offense has been committed in the arresting officer's presence, and likewise, that if the pretense for arrest be a misdemeanor, neither actual belief in the guilt of the arrested party nor reasonable grounds to suspect him to be guilty constitutes a justification for his arrest.

This, I believe, would be applicable to the situation outlined in your letter in view of the fact that your officers could have no actual knowledge of a violation until such search had been made, and consequently no offense would have been committed in said inspecting officers presence until the result of said search had been ascertained.

Our State Constitution of 1901 Article 1, Section 5, provides:

"That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure of searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

Therefore, the right of search would not exist unless said officer had in his possession a properly issued search warrant, and as pointed out said officer would not have the authority to arrest said person for the purpose of carrying him before a magistrate unless said offense be actually committed in the officer's presence.

In regard to your second inquiry I wish to state that it is my opinion that you, as Director of the Department of Conservation, may properly promulgate a rule or regulation requiring that hunters, or other persons, transporting or carrying game within the State, as defined by Title 8, Section 107, so carry said game in open receptacles or, if not so carried, that any game bag, hunting coat, or like article used for the carrying of game shall be open to the inspection of officers of your department upon proper identification of said officer.

Your authority to promulgate such rule will be found in Title 8, Section 7, Code of Alabama 1940 which reads as follows:

"Rules and regulations; penalties for violation thereof.—The director of conservation shall have and exercise all rule making powers of any division of the department of conservation subject to the provisions of section 9 of this title. The director of conservation shall have power and authority to establish and promulgate rules and regulations (including amendments and repeals thereof) with respect to the manner of performance of all functions and duties of the department of conservation, which rules and regulations shall be reasonably calculated to effect the expeditious and efficient performance of such functions and duties and shall not be in conflict with applicable statutes. The rule making power of the director of conservation shall not be delegated, except as otherwise expressly provided."

If such rule be promulgated by you a violation of same would constitute a misdemeanor on the part of the offender, which transpiring in the presence of said officer would thereby empower the officer to arrest said offender and carry him before a magistrate where, if said person continued to refuse to allow inspection of his person or property, a search warrant could be issued.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 31, 1946.

Mrs. F. C. Turner,

Judge of Probate,

Washington County,

Chatom, Alabama.

Counties—Quick Freeze Plants—Constitution of 1901, Section 94—

County not authorized to contribute to or build a quick freeze plant.

Opinion by Assistant Attorney General Sykes.

Dear Mrs. Turner:

Your request for an official opinion, bearing date of June 29, 1946, is as follows:

"The Court of County Commissioners of Washington County has been requested to appropriate monies for the erection of a Quick freezing plant to be located in the town of Chatom, Alabama.

"There has been two plans suggested for financing the project:

"No. 1. The county to make an appropriation, supplementing the amount raised by private subscription and to be operated by parties selected from its citizenship.

"No. 2. The county to make an appropriation in an amount sufficient to build the plant and the same to be operated under orders of the Commissioners Court and making certain charges to the patrons.

"The county has a sufficient surplus on hand to carry out either of the above plans and the Court of County Commissioners are very anxious to make possible this service to its people of Washington County, but the question of the legality of making this appropriation has been raised, therefore, we are herewith asking for an opinion on this case."

It is my opinion that the county governing body is not authorized to make an appropriation for the purpose of constructing or contributing to a quick freeze plant.

Section 94, of the Constitution of 1901, provides as follows:

"Sec. 94. The legislature shall not have power to authorize any county, city or town or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

This section of the Constitution has been construed to mean that the county is not authorized to appropriate public funds for the purpose of locating and promoting a canning plant. 37 **Quarterly Report of the Attorney General,** page 31. See also **Stone v. State,** 223 Ala. 426, 136 So. 726. Therefore, it is our opinion that, if pursued, Plan No. 1 would be in direct conflict with Section 94 of the Constitution.

As to Plan No. 2 we do not find any authority of law for the county to build and operate a quick freeze plant even though the county operates the plant. You are further advised that the public benefit to be derived from a quick freeze plant does not remove the constitutional obstruction, nor authorize the county to engage in a business not authorized by law. See **Southern Railway Co. v. Hartshorn,** 162 Ala. 491, 50 So. 139.

Trusting that this answers your inquiry, we are

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 31, 1946.

Hon. A. C. Pitts, Commissioner,

Department of Revenue,

Montgomery, Alabama.

Income Tax—Waiver—Title 51, Section 412, Code of 1940.

1. Where an income taxpayer at the request of the State has executed a waiver as set out in Title 51, Section 412, Code of Alabama, 1940, and upon final determination of the taxpayer's liability to the state it is found that he has made an overpayment in his income tax for a given year then the Department of Revenue is authorized to refund such overpayment to the taxpayer.

2. A waiver executed under the provisions of Title 51, Section 412, Code of Alabama, 1940, is in effect a dual waiver and works for the benefit of the taxpayer as well as for the State.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of July 25, 1946, is as follows:

"Legal questions are raised by an income taxpayer, a foreign corporation qualified to do business in the State of Alabama which seems to re-

quire an official opinion, which is hereby requested. The questions raised by the taxpayer, who has incurred liability and paid income tax to the State of Alabama for the years 1940 and 1941 as result of audit of the returns disclosing liabilities different from those shown by the taxpayer's returns—a less liability for the year 1940 and an increased liability for the year 1941, are set forth in specific statement of facts as follows:

"1. The two returns in question were timely filed by the taxpayer showing liabilities, $78,254.64 for the year 1940 and $38,071.74 for the year 1941.

"2. Final assessments were not made within the two-year period fixed by Statute, Section 412(a) of the Revenue Code of 1940 and corresponding provisions of prior income tax laws.

"3. Before the expiration of the time prescribed by statute, waiver in the form of consent in writing was executed by the taxpayer and the Commission for the Department. The waiver was made to expire March 15, 1945. (Copy of the waiver form is attached for reference.)

"4. Within the period covered by the waiver, to be exact, November 22, 1944, final determination of the liabilities was made as result of audit based on federal revenue agent's reports, the net result being an over-payment for the year 1940 in amount of $3,734.73, including interest, and additional tax for the year 1941 of $1,095.63, including interest. The net result of the audit and final determination of the liabilities for the two years was an over-payment of $2,639.10.

"5. A formal application for refund on forms furnished by the Department not having been previously filed, the taxpayer, on June 25, 1946, filed such claim for the year 1940 in conjunction with the audit of the two returns, 1940 and 1941, in amount of $2,639.10. The application was filed within the two-year period from date of expiration of the waiver, March 15, 1945, which waiver is referred to in Item 3 above. The provisions relative to tax paid through mistake or error are set forth in Section 410 of the Revenue Code of 1940. (Copy of the form provided by the Department and used by the taxpayer in filing application for refund is attached for reference.)

"The Department has tentatively declined to certify the claim to the Comptroller for payment on the ground that the taxpayer did not make the application within the two-year period from date of payment of the tax for the year 1940, notwithstanding the waiver referred to in Item 3, an agreement under which both the taxpayer and the Commissioner consented to holding the returns open for final determination of the liabilities beyond the two-year period of limitations for assessment provided in Section 412.

"Counsel for the taxpayer has submitted in connection with the claim a statement of facts praying that the Department certify the over-payment in amount of $2,639.10. The statement is quoted for your consideration as follows:

"'Taxpayer made timely returns for income taxes for the years 1940 and 1941 and paid taxes as shown by such returns. At the request of the Department of Revenue, taxpayer and the Department executed "Waiver and consent fixing period of limitation for assessment of income tax" (Form IT-121) for said years 1940 and 1941. The effect of such waivers was the consent in writing by taxpayer and the Department that a final determination and assessment for said years could be made during the periods of such waivers and that upon such final determination and assessment, the Department should collect any additional tax due or refund or credit to taxpayer any overpayment made as shown by such final determination and assessment. Upon final determination of the amounts due by taxpayer for said years 1940 and 1941, which determination was made on November 22, 1944, the Department found that there was a net overpayment of $2,639.10. The overpayment having been assessed or found to be due under said waivers, it is prayed that the same be refunded.

"'Taxpayer avers that said waiver was in effect an application for refund of any overpayment found to be due and this claim is an amendment thereto showing the amount of such overpayment as finally determined.'

"Please advise by official opinion whether or not the Commissioner acting for the Department has legal authority to certify to the Comptroller for refund the amount of $2,639.10, representing the net overpayment for the year 1940. Bear in mind that the amount involved is undisputed either by the taxpayer or the Department. The specific question is whether or not the waiver extending the time in which final determination of the liability may be made serves to extend the time in which the taxpayer may file a valid claim for refund.

"The decision of the Supreme Court, **O. C. Outlaw versus State of Alabama**—appeal from Montgomery County Circuit Court, in Equity, may be of interest in connection with the questions herein presented."

I have carefully considered the facts set out in your request and it is my opinion that the overpayment should be refunded. The statute, **Title 51, Section 412,** provides in part as follows:

"(b) Waivers. Where before the expiration of the time prescribed in the foregoing section for the assessment of the tax, both the Department of Revenue and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed on."

The provisions follow closely the Federal provisions applying to waivers and under the existing Federal rule where a taxpayer has executed a waiver, if upon ultimate determination it is found that an overpayment has been made, he is entitled to a refund. I cannot but believe that the Legislature in providing for waivers and consents intended that they should serve both as a protection to the State and a protection to the taxpayer. I cannot imagine

that the Legislature would have deliberately authorized the Department to request a waiver of the taxpayer under which at any time during the period the Department could assess any additional amount of taxes that it saw fit and yet deprive the taxpayer of the protection of the statute of limitations and numerous other benefits which the statutes afford. The effect in my opinion of the waiver is dual. It operates as authority for the State Department of Revenue to assess any additional amount of taxes ultimately found to be due and at the same time operates as a petition for and agreement to refund of any overpayment which may ultimately be found to be due.

The provisions of the income statutes as particularly discussed in **Outlaw v. State,** 244 Alabama 153, 12 Southern (2) 388, are very persuasive of the correctness of this position. In the Outlaw Case the taxpayer had executed waivers from time to time and the Department finally made an assessment of taxes in addition to those which had been paid. The taxpayer took an appeal. The Court found that not only was the taxpayer not due the additional amount assessed, but had made an overpayment, and ordered the same refunded. The State objected on the technical ground that no formal petition for refund had been made within the two-year period, but the Court held that a final assessment having been made and an appeal taken therefrom the Court was authorized to order the refund. The reasoning of this opinion is very illuminating. Among other things, the Court said:

> "There was no final assessment of appellant's taxes until October 21, 1941. So far as we know there is no provision in our statutes for making a so-called 'deficiency assessment' of income taxes."
> The Court proceeds to quote **Section 402, Title 51,** as follows:
>
> > " 'The amount of income taxes imposed by this title shall be assessed within two years after the return was filed and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.'
>
> "Section 407, Title 51, Code 1940, provides for the assessment of income taxes. It provides that the amount shown to be due by the taxpayer's return shall constitute and create a prima facie liability for such amount on which taxes shall be paid as therein provided. Further that 'assessment' or 'assess' herein used shall refer to and mean the **final determination of the amount found to be due** by the Department of Revenue. Further that where the Department of Revenue determines that the amount due is different from that shown by the taxpayer's return, notice of such different amounts shall be given to the taxpayer by registered mail, return receipt requested, giving the taxpayer notice of the amount so fixed and the Department of Revenue shall fix a day not less than fifteen days from the date of such notice for hearing any protest of taxpayer. Upon hearing such protest or the taxpayer fails to appear on the day set, the Department of Revenue shall finally fix, determine and assess the amount of tax due and notify the tax payer thereof by registered mail."

The Court then quotes the statute authorizing the appeal from **"such assessments."**

It seems clear from the statutes quoted and this opinion of the Supreme Court that the assessment is the **final determination** of the State Department of Revenue and that such final assessment may be in an amount additional to that taxpayer initially paid or it may be an amount less than the taxpayer initially paid. Under either category, there is a final determination and assessment and one which would authorize the taxpayer to take an appeal. If upon such appeal where the Department of Revenue found and assessed an overpayment, the court would presumably find such overpayment and order the same refunded in the same manner as was done in the Outlaw Case.

It would be a futile thing where the Department finally determines and assesses an overpayment to require a taxpayer to take an appeal in order to get the amount refunded. The Legislature did not contemplate such unnecessary procedure nor, in my opinion, did it intend for a taxpayer who at the request of the State executed a waiver extending the statute of limitations to lose its right to have refunded any overpayment so finally determined and assessed. It is therefore my judgment and opinion that the execution by the taxpayer of the waiver operated as an agreement with the Department that the Department could assess any additional taxes found and at the same time would refund any overpayment found. In other words, it operated, if such purpose be necessary, as an informal petition for refund from the date of its execution. This being true, I think it is immaterial whether an additional petition for refund is filed or not, and the same would in effect be merely an amendment of the previous one included in the waiver. It might be a convenience as showing the exact amount finally determined.

From Paragraph 4 of your letter it appears that you have credited the overpayment for 1940 against the additional tax assessed for the year 1941. I am advised that it has been the general policy of the Department to credit an overpayment for a previous year against a deficiency for a subsequent year. I think you have acted correctly and your administrative custom long established is an administrative interpretation of the law to which great weight should be given. Crediting an overpayment against future taxes is substantially a refund of such overpayment and hence being authorized to make the credit, you are likewise authorized to make a refund of an overpayment.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

July 31, 1946.

Hon. Gordon Persons, President,

Alabama Public Service Commission,

Montgomery 1, Alabama.

MOTOR CARRIER ACT, GENERAL ACTS OF ALABAMA 1939, PAGES 1064-1090—

1. Subsection (c) of Section 10 of the Motor Carrier Act of 1939 does not contemplate or authorize the common carrier of passengers under a certificate of convenience to transport as passengers the general public on its motor vehicles while engaged in carrying parties on one of its motor vehicles under a special contract to places named in said Subsection (c).

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of July 13, 1946, is as follows:

"Section 10, Paragraph C, of the 1939 Motor Carrier Act reads, in part, as follows:

"'Any common carrier by motor vehicle transporting passengers issued or effective under the Act may transport to any place, a **special or chartered party or parties,** under such rules and regulations as the Commission prescribed; *** '

"Under the general terms of the 1939 Motor Carrier Act, the Commission has issued certificates of convenience and necessity to operators of **motor buses** who transport passengers over **regular routes.** The question now arises as to whether or not the holder of such a certificate which, as noted previously, covers **certain specified routes,** should also be allowed to act as a taxicab and thereby transport passengers to any point in the State. It would seem that the term 'special or chartered part or parties' should apply to a situation where, for example, a number of people might desire to **charter a bus** to take them to some point in the State, possibly a convention.

"Taxicab operations are acted upon by this Commission, literally by the hundreds and except in cases where particular need could be shown, it has been our policy to permit taxicab companies to operate to points and places within 25 miles of their headquarters.

"Some of the bus companies who operate buses on their duly certified route, which may be not more than a few miles in length, take the position that the words 'special or chartered party or parties' gives them the right, in addition to making special chartered trips **using buses** normally

used in operation over their regular routes, to also operate taxicabs which they do not use in connection with their bus operations, to make special or chartered trips anywhere in Alabama."

The whole proposition hinges upon the meaning of the phrase "may transport to any place a special or chartered party or parties" found in paragraph (c) of Section 10 of the Motor Carrier Act of the Legislature of 1939. General Acts 1939, pages 1064-1090. The meaning of this phrase may be determined by the language used when considered in connection with other provisions of the Act.

If the language used leaves no doubt as to the intent of the legislature then it speaks for itself and construction ends. The rule is that the words used must be given their ordinary meaning unless as used they show an intent that they shall be considered in a technical sense, in which case they are to be considered as used in that sense.

Giving all due respect to the legislature we may say that the clause is somewhat awkwardly worded, but as we view the expression the clause becomes clear when considered with other provisions and the general purpose of the Act.

Section 1 of the Act defines the term common carrier by motor vehicle to mean any person who or which undertakes to transport passengers or property for the general public in the state by motor vehicles for compensation.

Section 3 of the Act forbids such a common carrier from transporting persons or property on any highway in the state unless and until the carrier complies with the provisions of the Act. One of the provisions that is the central figure here is that common carriers shall have issued to them a certificate of public convenience. Sections 8 and 9.

Section 10 requires that this certificate shall specify the service to be rendered and the rates and termini of the route or a named territory over which it shall operate. This brings us to Subsection (c) now under review.

This Subsection (c) prescribes an enlargement of or addition to Section 10 by allowing such common carrier, holding a certificate authorizing it to transport passengers to places other than those named in the certificate, and this may be done under agreement or chartered party. The ordinary meaning of the word special is the antithesis of the word general. It means particular, specific; designed for a particular purpose, occasion, or person. 39 Words and Phrases, (Permanent Edition) page 531. This word "specially" is followed by the words "chartered party or parties." This latter phrase is used in a technical sense, and anciently it was a well-known term used in mercantile law. It meant a contract by which an entire ship or some particular part thereof was let to a merchant for the conveyance of goods on a determined voyage to one or more places. The phrase has been broadened to mean the hiring of a vessel for exclusive use or a special purpose. Words and Phrases (Permanent Edition), pages 670-671; Black's Law Dictionary, De Luxe Edition, pages 515-516; Webster's International Dictionary.

Obviously the legislature used the words here in a broadened sense to apply to a motor vehicle. It has no application to the use of the vehicle for general hire or use to the public. It is limited to a hire of the vehicle to a person or persons to transport them for some special trip to a named place for a given purpose, and in carrying out this special contract the common carrier is not performing any duties to the general public and they are not entitled to demand transportation on the vehicle making such a trip.

To conclude otherwise would effectively destroy the very purpose of the Act requiring a certificate of convenience. We conclude that your construction of the clause is correct.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

August 22, 1946.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Tax Sales—Redemption—Code 1940, Title 51, Sections 300, 307, 308 and 309.

1. When a tract of land in a city is assessed without dividing the same into lots, and the property is later sold for taxes and purchased by the State, a person entitled to redeem may redeem from said tax sale a portion of the property without redeeming that part of the property which has sold to the city at a sale for the enforcement of the payment of street improvements.

2. The holder of a judgment in which specific property is described may not redeem any of the property covered by a tax sale when the description of the property set out in the judgment does not include any of the property described in the decree ordering the tax sale.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 9, 1946, is as follows:

"Re: Partial Redemption

"A taxpayer of this county purchased sometime prior to 1930, Block 46, Walker Farm Lots Subdivision. This is all one parcel of property not divided into lots, and contains nine and one-half acres of land.

"In 1942 the City of Birmingham purchased at a street improvement sale 331 feet on the north end of this block. Now comes the former owner and wishes to redeem only that part of this parcel of property on which the city has no lien for street improvements, leaving that part the city has both in the state and city.

"The question is, can an owner redeem only a portion of a parcel of property under the circumstances as outlined above.

"Another instance is as follows. In November 1933, a few days prior to the tax sale held on November 20, 1933, for 1932 taxes, a judgment was obtained against a large parcel of property which was contiguous but assessed in separate tracts. The land description in the judgment rendered does not agree with either the description as shown by the records in the assessor's office or map made of the property dividing it into tracts by a civil engineer prior to the time of the sale.

"The question is, can the party who has a judgment redeem any part he sees fit to redeem whether it agrees with any of the descriptions or records carried in this office or not?"

In answering your first inquiry, it is assumed that the entire tract of land under consideration sold for state and county taxes and was purchased by the State, the title to the same being still in the State.

Your attention is called to Title 51, Section 307, Code of Alabama 1940, which Section is as follows:

"§ 307. Lots or parcels which can be ascertained by legal and usual subdivision.—When any tracts, lots, or parcels of land have been included in one assessment and sold for taxes under one decree, the owner or any one entitled to redeem may redeem any lot or part of said property where the part to be redeemed can be ascertained by legal and usual subdivision. It shall be the duty of the tax assessor to ascertain the amount of taxes on such portion desired to be redeemed as provided for under section 304 of this title."

It is my opinion that under the provisions of the above quoted Section the taxpayer under consideration may redeem that part of the property included in the tax sale which was not purchased by the City of Birmingham at a sale for the enforcement of the payment of street improvements.

Sections 308 and 309, Title 51, Code 1940 set out in detail provisions dealing with the manner in which partial redemptions may be made. Section 308 (which deals with redemptions under Section 307, supra) requires that the applicant desiring to make a partial redemption, among other things, must set out the description of the lot or parcel of land included in the decree and the assessed value thereof, "if separately valued in the assessment, or if not

separately valued stating that fact, and setting the assessed value of the whole of the lands, a description of the lot or parcel which the applicant seeks to redeem, and if not separately valued in the assessment, stating the value thereof at the time of the assessment, the nature of his interest in such lot or parcel *** ."

In the case under consideration, the application should set out a description of the entire tract and a description of that part of the entire tract sought to be redeemed. It should not be difficult to obtain a description of the "331 feet on the north end" of Block 46, Walker Farm Lots Subdivision, which is the land purchased by the City of Birmingham at the street improvement sale. The part to be redeemed could be described in the application as Block 46, Walker Farm Lots Subdivision, LESS the 331 feet on the north end of said Block 46 (setting out a description of said 331 feet) which was purchased by the City of Birmingham at a street improvement sale (setting out date of sale).

Under the provisions of Section 309, the application for a partial redemption must be approved by the State Land Commissioner when the land sought to be redeemed was purchased at the tax sale by the State.

In answering your second inquiry, it is assumed that the description of the property under consideration as shown by the records in the office of the tax assessor is correct.

It is my opinion that the person who has the judgment may not redeem any of the property covered by the tax sale when the description of the property set out in the judgment does not include any of the property described in the decree ordering the tax sale.

Under the provisions of Title 51, Section 300, Code of Alabama 1940, a judgment creditor may, under certain conditions, redeem real estate that has been sold for taxes. However, a person who has obtained a judgment against specific real estate which is described in the judgment would have no right to redeem real estate that has been sold for taxes which was not the identical property described in the judgment.

The application for a partial redemption must set out a description of the lot or parcel of land sought to be redeemed. If none of the property described in the judgment was sold for taxes, the holder of this judgment would not have any right to redeem any of the property covered by the tax sale. If the judgment erroneously described the property, such error should be corrected by proper procedure.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 3, 1946.

Hon. Eugene H. Hawkins,

Judge of Probate,

Jefferson County,

Birmingham, Alabama.

Code 1940 ,Tit. 17, §§ 148-155—Elections—Ballots.

Where a special election to fill an unexpired term is to be held on the same date and at the same polling places as a regular general election a single ballot showing the names of all candidates to be then voted on may be used, prepared in accordance with the form of ballot prescribed by Title 17, § 155, provided the election officers are the same for both elections.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of August 13, 1946, is as follows:

"Please advise whether or not the ballots for the Special and General Election in November may be consolidated and printed as one ballot entitled 'General and Special Election.' If this can be done a great deal of time will be saved in handling the ballots and the expense to the counties will be cut approximately in half."

The provisions of law relating to the preparation, form and printing of ballots for all elections will be found in Code 1940, Title 17, §§ 148-155. I find nothing therein that would require separate ballots under the circumstances above stated. In my opinion one ballot may be used showing the names of all candidates and in form as prescribed in Section 155, showing which candidate (or candidates) will be elected for unexpired term or terms. It is assumed of course that the same election officers will hold both elections.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 5, 1946.

Hon. Bradley G. Brown,

License Inspector,

Jefferson County,

Birmingham, Alabama.

Motor Vehicles—Licenses—

1. Truck license is based on manufacturer's rated capacity under the provisions of Section 697, Title 51, Code of 1940, and not the actual load carried as indicated in Section 78, Title 36, Code of 1940.

2. Trailer and semi-trailer license is fifty percent of the cost of the license tag of the motor vehicle by which it is drawn, and is to be computed on what the license of the said motor vehicle would cost at the time of the purchase of the required trailer tag. (Section 703, Title 51, Code of 1940.)

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1946, is as follows:

"Under Section 697, Title 51 of the Code of 1940, the license is levied on trucks, based on the manufacturer's rated capacity, whereas, under Section 78, Title 36, Code of 1940, it is provided that it is a misdemeanor if the license tag attached to the vehicle is not of the proper classification, computed upon the basis of the load carried upon the vehicle. As one of these sections levies a license on the manufacturer's rated capacity and the other, by inference, on the load carried, I will appreciate you advising which section we are to be guided by in the enforcement of the license tag law, pertaining to motor trucks.

"As an example; a popular make motor tractor is rated by the manufacturer as a ton and half and is being operated with an 'H2' tag, whereas, this vehicle is carrying a load on the trailer, that is pulled by the tractor, of 15,000 pounds—what is the proper tag classification?"

In answer to your general inquiry it is my opinion that the license levied on trucks is based on the manufacturer's rated capacity under the provisions of Section 697, Title 51, Code of 1940, and not on the actual load carried as indicated in Section 78, Title 36, Code of 1940.

Our Supreme Court in the case of **State v. Hobbie Grocery Company,** 225 Ala. 151, 142 So. 46, held that the manufacturer's rated carrying capacity of trucks was the proper basis for the tag tax, and under a license statute taxing trucks on a tonnage basis as classified by manufacturers, the State could not require a license tax based on the maximum load actually hauled over the highway.

Said opinion construed the license schedule of the various revenue acts, which were the predecessors to Section 697, Title 51, Code of 1940. These former license schedules did not include the words, "based on the manufacturer's rated capacity stamped on the truck," as used in Section 697, supra, yet it was held that such was the proper basis of taxation in view of the administrative construction of long standing to that effect. The above quoted words were inserted in Section 697 to meet this decision. Said opinion pointed out that Section 81 of the Highway Act of 1927 (General Acts 1927, pages 348-379) did not undertake to make a classification, but was to penalize the using of a license tag of improper classification, the classification being governed by the appropriate license schedule. This section of the Highway Act of 1927 now appears as Secton 78, Title 36, Code of 1940.—See also **Waters v. State**, 25 Ala. App. 144, 142 So. 113.

In the specific example set out in your inquiry you refer to a motor tractor with a manufacturer's rating of a ton and a half, which is being operated with an H2 tag. I presume that you mean a motor truck rather than a motor tractor. The license for a motor tractor is governed by Section 702, Title 51, Code of 1940, and this section requires a license tax of $100.00. Section 697 of Title 51, Code of 1940, provides for the license on trucks on a graduated scale, and this section is dealt with in your general inquiry.

The license required for trailers and semi-trailers is set forth in Section 703, Title 51, Code of 1940, and is fifty percent of the cost of the license tag of the motor vehicle by which it is drawn, and is to be computed on what the license of the said motor vehicle would cost at the time of the purchase of the required trailer tag. —See Quarterly Reports of Attorney General, Volume 16, page 272.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 5, 1946.

Hon. W. H. MacGregor, Secretary-Treasurer,

Employees' Retirement System,

Montgomery 5, Alabama.

Employees' Retirement System—Eligibility for membership—Act No. 515, General Acts of 1945, p. 734. The phrase "a department head authorized to exercise sovereign power of the State" construed.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of August 5, 1946, is as follows:

"**IN RE:** Eligibility of Department Heads for Membership in Employees' Retirement System:

"The term 'employee' as used in Act No. 515, approved July 9, 1945 is defined in Section 1, sub-section 2, of said Act. This sub-section reads:

> "'"Employee" shall mean any regular employee of the State of Alabama whose salary is paid on a monthly basis by state warrant by the State, except a member of the Legislature of the State, a person who is covered or eligible to be covered under the Teachers' Retirement System of Alabama or any other retirement system to which contributions are made by the State, an elective official of the State Government or a department head authorized to exercise sovereign power of the State, and a temporary employee or person engaged under retainer or special agreement. In all cases of doubt the Board of Control shall determine who is an employee within the meaning of this Act.'

"There has arisen in the minds of the members of the Board of Trustees of the Employees' Retirement System certain doubt as to the meaning of a phrase employed in the above quoted sub-section, to-wit: 'A department head authorized to exercise sovereign power of the State.'

"This doubt being present, you, as legal advisor of the Board of Trustees, are hereby requested to supply the Board with a definition of this phrase, in order that the Board of Trustees may determine the eligibility for membership in the Employees' Retirement System of certain persons who hold positions designated as heads of departments of State Government.

"You are also requested to advise the Board of Trustees whether or not, in your opinion, the following State employees are eligible for membership in the Employees' Retirement System, established under Act No. 515:

"Dr. B. F. Austin, State Health Officer

Mr. Charles W. Kirby, Secretary of Milk Control Board

Dr. Walter B. Jones, State Geologist, Geological Survey

Mr. Clarence Horton, State Service Commissioner, Department of Veterans' Affairs

Miss Loula Dunn, Director, Department of Public Welfare

Mr. George A. Thomas, Director of Real Estate Commission."

Rather than attempt to define the phrase "department head authorized to exercise sovereign power of the State," which admits of no exact definition, in my opinion the best approach in answering your inquiry is (1) to show in what manner the sovereign power of the State manifests itself, (2) to de-

termine whether the particular department is authorized to function within such fields, and (3) to determine whether the exercise of such functions is delegated to the head of a particular department.

In the case of **United States v. Douglas-Willan Sartoris Co.,** 22 Pac. 92, 3 Wyo. 287, the following statement is found:

> "In all governments of constitutional limitation sovereign power emphasizes itself in but three ways: by exercising the right of taxation; the right of eminent domain and through its police power. *** The range of this power (police) is sweeping. The extent to which it may go, the limits within which it is circumscribed, cannot be defined by any formulated rule. That it extends to public morals, the health and safety of the citizens and in special and peculiar cases to the conservation of public conveniences, will be admitted."

The following statement, which is illustrative of which is meant by "sovereignty of the State" is found in the case of **State, ex rel. Landis v. Board of Commissioners of Butler County,** 95 Ohio St. 157, 115 N. E. 919, 920.

> "If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state."

To specifically answer your inquiry as to a particular individual designated in your request, I have examined the statutes relating to the department with which he is connected and have reached the following conclusions:

(1) Dr. B. F. Austin, State Health Officer, is eligible for membership in the Employees' Retirement System of Alabama.

Under the provisions of Title 22, Section 7, Code of Alabama 1940, the State Board of Health is authorized to exercise general control over the enforcement of laws relating to public health.

In speaking of the authority of the State Board of Health the court in the case of **Hard v. The State,** 228 Ala. 517, 154 So. 77, said, "The State Board of Health is the supreme supervisory power in this governmental unit, the State Board of Health. It has jurisdiction and authority 'to exercise general control over the enforcement of laws relating to public health.' *** "

It will thus be seen that the Legislature has delegated police power of the State in regard to public health to the State Board of Health.

The State Health Officer who is the executive officer of the State Board of Health is elected by the State Board of Health and shall "under the direction of the State Board of Health exercise general supervision over county boards of health and county municipal health officers." Title 22, Section 9, Code of Alabama 1940.

Police power in regard to public health is delegated to the State Board of Health and not to the State Health Officer. In the exercise of his duties, he is carrying out the policies of the State Board of Health and is not independently exercising any sovereign power of the State.

Under the provisions of Title 22, Section 3, Code of Alabama 1940, when neither the State Board of Health nor the State Committee of Public Health are in session, the State Health Officer is authorized to act for said Board and said Committee, but is required "to report his actions to said Board and said Committee, at their next regular respective meetings, for confirmation or modification."

In view of the fact that the State Health Officer is not authorized to exercise sovereign powers of the State, it is my conclusion as stated above that he is eligible for membership in the Employees' Retirement System of Alabama.

(2) Mr. Charles W. Kirby, Secretary of the Milk Control Board, is eligible for membership in the Employees' Retirement System of Alabama.

The members of the Milk Control Board are appointed under the provisions of Title 22, Section 207, Code of Alabama 1940. Under the provisions of Title 22, Section 210, this Board is vested with the power to supervise and regulate the fluid milk industry of Alabama. This authority is a delegation to said Board of police power, which power is one of the sovereign powers of the State.

Under the provisions of Title 22, Section 220, the Board has authority to designate an executive secretary "who shall have charge of the administration of the Milk Control Board's orders, rules and regulations." Such secretary has no independent authority to exercise sovereign power of the State, which sovereign power has been delegated to the Milk Control Board, nor could he be considered a department head within the meaning of the Employees' Retirement Act.

(3) Dr. Walter B. Jones, State Geologist, is eligible to membership in the Employees' Retirement System of Alabama.

There has been no delegation of any sovereign power of the State in the statutes providing for the appointment of a State Geologist and in defining his duties and powers. For this reason the State Geologist is not "a department head authorized to exercise sovereign power of the State," and is, therefore, eligible for membership in the Employees' Retirement System of Alabama.

(4) Mr. Clarence Horton, State Service Commissioner, is eligible for membership in the Employees' Retirement System of Alabama.

The State Department of Veterans' Affairs is created by Act No. 173, General Acts of Alabama 1945, approved June 23, 1945. Section 3 of said Act provides for the composition, terms, and duties of the State Board of Veterans' Affairs. None of the sovereign powers of the State are delegated to this Board. The purpose of the Act was to provide 'a service" for veterans. The State Service Commissioner is appointed under the provisions of Section

4 of said Act, and in the exercise of his duties is subject to the State Board of Veterans' Affairs. It, therefore, follows that the State Service Commissioner of the State of Alabama is eligible for membership in the Employees' Retirement System of Alabama.

(5) Miss Loula Dunn, Commissioner of the Department of Public Welfare, is eligible for membership in the Employees' Retirement System of Alabama.

Title 49, Section 2, Code of Alabama 1940, provides that there shall be a State Department of Public Welfare. Under the provisions of Section 3 of said Title, provisions are made for a State Board of Public Welfare. In this Board is vested police power of the State in regard to public welfare, and the duties of the Board involve the exercise of sovereign power of the State.

The Commissioner of Public Welfare is appointed by the State Board under the provisions of Title 49, Section 4, and "all administrative and executive duties and responsibilities of the State Department shall be performed by the Commissioner subject to the authority of the State Board."

The reasoning given by me in considering whether or not the State Health Officer is eligible for membership in the Employees' Retirement System is also applicable in determining the eligibility of the Commissioner of Public Welfare for such membership.

It is, therefore, my conclusion that the Commissioner of Public Welfare is eligible for membership in the Employees' Retirement System of Alabama.

(6) Mr. George A. Thomas, Secretary of the Real Estate Commission, is eligible for membership in the Employees' Retirement System. (I find no provision of law providing for the appointment of a Director of the Real Estate Commission, and assume that reference is made to the Secretary who may be employed by the Commission under the provisions of Title 46, Section 300, Code of Alabama 1940.)

The Real Estate Commission is created under the provisions of Title 46, Section 300, Code of Alabama 1940. Under the provisions of said Section 300, the Real Estate Commission is authorized to employ "a secretary and such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this chapter, and shall outline their duties and fix their compensation, subject to the general laws of the State." The secretary employed by said Commission is not a department head, but is an employee of the Commission. He has no independent authority to exercise sovereign power of the State, which sovereign power has been delegated to the Real Estate Commission.

It, therefore, follows that the Secretary of the Real Estate Commission is eligible for membership in the Employees' Retirement System of Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 12, 1946.

Hon. Lawrence A. May,

First Assistant, State Service Commissioner,

Department of Veterans' Affairs,

Montgomery, Alabama.

Veterans—Insane Persons—

Under the provisions of Section 211, Title 45, Code of 1940, the county is liable for expenses of conveying an incompetent indigent veteran to a United States Veterans' Hospital, only in cases where said veteran is a resident of said county and properly committed by the Judge of Probate thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 9, 1946, is as follows:

"This Department is desirous of a clarification of the law in regard to the commitment of indigent and incompetent veterans to the hospitals operated by the U. S. Veterans Administration and the impossibility of the Counties to pay for the expenses of conveying such veterans to said hospitals under the following circumstances:

"1. In case the veteran is a nonresident of the State of Alabama.

"2. In case the veteran is a resident of the State of Alabama but not a resident of the County in which he is taken into custody.

"3. In case where the veteran has heretofore been committed and conveyed to the hospital but is subsequently discharged.

"4. In case where the veteran has heretofore been committed and conveyed to the hospital but is out 'on trial'.

"5. In case where the veteran has been committed and conveyed to the hospital and subsequently escapes."

Before answering your specific inquiries, I wish to invite your attention to an opinion of this office found in Quarterly Report of Attorney General, Vol. XXXVI, p. 5. Said opinion reads in pertinent part as follows:

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"The Judge of Probate upon a hearing before him as to the sanity of a person alleged to be of unsound mind is, under certain conditions,

authorized to commit such person to a U. S. Veterans' Hospital if such person is entitled to admission thereto. And upon commitment of such person to a hospital the Judge of Probate is further required to appoint some person or persons, whether officers or not, 'as he may see fit, to convey the patient to the hospital.' The expense of conveying indigent patients to a hospital is payable by the county, 'on order from the county commissioners.' Code 1940, Tit. 45, §§ 210, 211.

"Code 1940, Tit. 21, § 175 also prescribes the procedure for admission of incompetent veterans to a veterans' hospital,—without reference however to payment of the expense of transportation.

"From the foregoing it is clear that the county is authorized to pay the expense of transporting the veteran to the veterans' hospital in case he is found to be indigent, and not otherwise. Whether he is in fact indigent is to be determined by the Judge of Probate upon the hearing prescribed by Title 45, Section 210, supra, after examination of witnesses and investigation of the facts of the case, as thereby required.

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"It naturally follows that if the veteran, when committed, is not indigent, the expense of transportation is a proper charge against his estate, payable by his guardian as other claims against the ward's estate, Code 1940, Tit. 21, § 168."

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Said opinion further holds that Act #575, House 421, approved July 7, 1943, (Gen. Acts 1943, page 578) has no application as such act is applicable only to transportation of insane persons to "a State Hospital for the insane."

The provisions providing for the commitment of insane persons to hospitals by Judges of Probate are applicable only to situations where the person sought to be committed is a resident of the County in which the proceedings are instituted. Section 208, Title 45, Code of 1940, refers to "the judge of probate of the **county in which the person resides.**" Section 210, Title 45, Code of 1940, refers to **"a resident of the county."** The words "the patient," as used in Section 211, Title 45, Code of 1940, refers to the patient described in the preceding section, who is a resident of the county in which the proceedings are instituted. It, therefore, follows generally that a Judge of Probate may not commit a nonresident of the State nor one who is not a resident of his County to an insane hospital. However, there is an exception in the case of the Judge of Probate of Tuscaloosa County under the provisions of Section 220, Title 45, Code of 1940, which is applicable only to residents of the State.—Quarterly Report, Attorney General, Vol. XXIV, p. 196; See also Quarterly Report of Attorney General, Vol. XIV, p. 73.

In case an incompetent veteran, who is a resident of the State, is taken into custody in the county other than his residence, he should be taken to Tuscaloosa County or the case transferred to the county of his residence for commitment.

The above should give you the information desired in your first and second inquiries.

In regard to your third, fourth and fifth inquiries, I wish to refer you to Section 219, Title 45, Code of 1940, which is as follows:

> "§ 219. Patients; when removed on furlough.—When, in the opinion of physicians of the hospital, patients are permanently restored to a normal mental condition, they shall be allowed to leave the hospital, and be marked in the records as 'discharged.' When, in the opinion of the physicians, there is some question as to whether the recovery of patients will prove permanent, but they are sufficiently restored for their friends, relatives or others to properly and safely remove them, they may be allowed to go 'on trial' and shall be so marked in the records. Patients 'on trial' may be returned, if necessary, any time within six months, without additional committing papers. If they stay away from the hospital over six months, they shall be marked 'discharged' in the record. No 'discharged' patient shall be returned without the same legal process, as if they had never been patients in the hospital."

If a patient has been discharged, new proceedings must be instituted and new commitment papers issued. In this event the county would be responsible for the transportation expenses of an indigent incompetent veteran, who is a resident of that county, as in the case of an original commitment.

If the veteran is merely allowed to go "on trial" and it becomes necessary to take him into custody before final discharge, or if he is an escape, no new commitment is necessary. He may be confined under the original commitment order if such indigent incompetent veteran is a resident of said county. The county will be liable for the transportation of reconveying the patient to the hospital. Section 211 of Title 45, supra, provides for the expenses for conveying the patient to the hospital without reference to the number of times it is necessary to so convey said patient.

The above should give you the desired information in regard to your third, fourth and fifth inquiries. However, it must be borne in mind in order for the county to be liable for the transportation expenses, the incompetent veteran must have been not only indigent, but also a resident of the county which is sought to be held liable for expenses and committed from the county. —Quarterly Report of Attorney General, Vol. XIV, p. 73, supra.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 19, 1946.

Hon. J. H. Meighan, President,

City Commission of Gadsden,

Etowah County,

Gadsden, Alabama.

Municipal Corporations—Labor Unions—

1. Municipality has no authority to enter into contract with a labor union, recognizing such union as the bargaining agent for municipal employees.

2. Municipality may require that its policemen employees not belong to a labor union, either as a condition precedent to employment or as a condition subsequent to the retention of said employees.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of September 18, 1946, is as follows:

"(1) Can a municipality legally enter into a contract or agreement with a labor organization or union, recognizing said union as a bargaining agent for employees of the municipality?

"(2) Can a municipality require that its policemen employees not belong to a labor union, either as a condition precedent to employment or as a condition subsequent to the retention of said employees?"

I am of the opinion that your first inquiry should be answered in the negative.

In an opinion of this office rendered to the President of the Etowah County Board of Revenue under date of April 10, 1941, it was held that a county may not legally enter into a contract or agreement with a labor organization or union, recognizing such union as a bargaining agent for county employee members of said union and agreeing as to hours and employment, wages, vacations with pay, and holidays with pay for county employee members of said union.

The holding of said opinion was based on two theories. Firstly, that the county, a mere political subdivision of the State—an agency of limited jurisdiction having only those powers expressly authorized by statute, or necessarily implied therefrom—could not legally enter into such a contract, the ultimate effect of which might be to remove the control of the government from the people as a whole, acting through their duly constituted officials; and secondly, that such a contract would be contrary to the public policy of

this State, which policy was evidenced by House Joint Resolution No. 142, approved July 10, 1940 (General Acts 1939, page 1004).

A "City" is a mere political subdivision of the State and is created as a convenient agency for the exercise of such governmental powers of the State as may be entrusted to it. **City of Bessemer v. Personnel Board for Jefferson County,** 240 Ala. 411, 199 So. 815. Such a corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. 15 **Alabama Digest** (Municipal Corporations), Key No. 57.

It follows that municipalities are in the same category as counties, in so far as the matter of your inquiry is concerned. Therefore, both the holding and the reasons therefor, as applied to counties in the above noted opinion, are likewise applicable to municipalities.

In my opinion both portions of your second inquiry should be answered in the affirmative.

The Supreme Court of Mississippi in the case of **City of Jackson v. McLeod,** 24 So. 2d 319, in which case certiorari was denied by the Supreme Court of the United States, 66 Sup. Ct. Rep. 1368, held that a municipality could discharge one of its policemen employees for not severing his connections with a labor union after due notice to said policeman that such action would be taken if he failed to do so. Said opinion reads in part as follows:

"* * * * * *

"A municipal council in employing and in discharging policemen and other municipal employees and in prescribing rules and regulations for the conduct of such employees is acting in an executive or administrative capacity, ***

"* * * * * *

"It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are liable to arise, which in turn may lead to disorders. And inasmuch as the City Council is elected by the people and made responsible to the people for the proper conduct of every department of the city government, the police employees must be responsible to the council and must be under its direction, free from the obligation of any other allegiance whatsoever, so far as their activities as policemen are concerned. ***

"* * * * * *

"In Fraternal Order of Police v. Lansing Board of Commissioners, 306 Mich. 68, 10 N. W. 2d 310, 312, the latest case on the subject, it is said: 'Police and fire departments are in a class apart. Both are at times charged with the preservation of the public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained,' quoting from Carter v. Thompson, 164 Va. 312, 180 S. E. 410. In Hutchinson v. Magee, 278 Pa. 119, 122 A. 234, the court said: 'It is generally conceded that association with any organization which, on any occasion or for any purpose, attempts to control the relations of members of either police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. *** If plaintiffs desired to retain their positions in the public service, they should have obeyed the director's order; having elected not to do so (which, of course, was the privilege of each of them, as individuals), they cannot successfully complain of the ensuing results.' See also McNatt et al. v. Lawther, Tex. Civ. App., 223 S. W. 503; San Antonio, etc., Local Union v. Bell, Tex. Civ. App., 223 S. W. 506; Brownell v. Russell, 76 Vt. 326, 57 A. 103; and McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517. No case to the contrary of these holdings, when carefully examined, has been cited by appellee."

The courts of Alabama have not directly passed upon the matter of the inquiry under consideration. However, in view of the above holding of the Mississippi Supreme Court, which was in effect affirmed by the Supreme Court of the United States, I am constrained to follow said holding. Consequently, it is my opinion that the municipality may require that its policemen employees not belong to a labor union or organization, either as a condition precedent to employment or as a condition subsequent to the retention of said employees.

The above holding in regard to policemen is in my opinion equally applicable to other employees of a municipal corporation.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 24, 1946.

Hon. Hayes Tucker,

Director of Finance,

Montgomery, Alabama.

Act 418—Alabama Polytechnic Institute—Bonded Indebtedness—Governor—

1. The Governor, under authority of Act No. 418, is authorized to allocate to Alabama Polytechnic Institute out of the funds thereby appropriated a certain amount for the purpose of retiring bonds of said institution.

2. The Governor or other authorized state official may enter into an agreement with the Alabama Polytechnic Institute whereby the funds so allocated under Act No. 418 may be invested in United States Government or State bonds, and the proceeds of said government or state bonds, together with interest thereon, may be used to retire the bonded indebtedness at maturity.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, bearing date of September 19, 1946, is as follows:

"The Alabama Polytechnic Institute has some outstanding serial bonds which may be redeemed five years after date of issue. Please advise by official opinion whether the provisions of Act No. 418, 1945 Legislature, permit the Governor to pay over to that Institution funds for the retirement of these bonds by redemption or maturity in the future.

"Please extend this opinion to include whether or not this Institution may receive any sum so distributed and invest same in United States or State bonds under appropriate trust agreement, such bonds to be converted at the time of redemption or maturity of the outstanding bonds.

"Your prompt attention will be appreciated for an early disposition of this matter is sought."

The Supreme Court of Alabama in the case of Elbert B. Norton, Individually, and as Superintendent of Education v. Walter C. Lusk, Individually, and as Treasurer of Alabama, et als, determined the questions presented by your inquiry. The Court treated with the subject of "debt" in a manner that would remove from any realm of doubt such a classification of the instant obligations. The bonds in question are obligations outstanding and unpaid and meet the prerequisite designed in the Norton case, supra, in that they were outstanding as an unpaid obligation at the time of the enactment of Act No. 418 of the 1945 Legislature. The obligor on the securities is The Alabama Polytechnic Institute and therefore an institution of the State of

Alabama within the purview of said Act No. 418. Addressing itself to this proposition the Supreme Court in the Norton case had this to say:

> "When though, the Legislature authorized the Governor to use an appropriation to pay debts of a State institution, we do not think the Legislature meant to restrict the appropriation to such debts as would be so classified under the restrictive clauses of the Constitution."

and further,

> "If it was not intended to cover revenue bonds and such indebtedness of State institutions or agencies, then such institutions or agencies would be largely precluded from its operation."

The mere fact that the actual mechanics of placing funds so distributed pursuant to Act No. 418 may be consummated at some time in the future due to certain redemption privileges or future maturity dates would not defeat the purpose of this act nor an allocation pursuant thereto. This conclusion is fortified by the fact that the instant obligations could be retired by negotiation at once in order to avoid delay in payment. However, it is my opinion that the Courts would not force this type of subterfuge on Alabama Polytechnic Institute. It may be well to include at this point that by the terms of Act No. 418 the appropriation thereunder may be distributed for the payment of interest on an obligation as the same would constitute debt.

For answer to the second paragraph of your inquiry, there are no restrictions to be found anywhere which would prevent the safeguarding of funds distributed under Act No. 418. It would certainly be in order for Alabama Polytechnic Institute to enter into a trust agreement with the proper parties for the safekeeping of the funds and to earn any interest thereby until such time as the obligations may be retired. An investment of the funds in United States or State bonds pending payment of the outstanding bonds would serve to reduce the net interest cost of the outstanding bonds and thereby constitute a partial payment of the debt. Thus we have an immediate use of the funds toward the payment of the debt of the Alabama Polytechnic Institute.

The conclusions reached in this opinion are based upon careful deliberation of the opinion of the Supreme Court in the Norton case, and it is my opinion that the conclusions in that case would have been the same even though the retirement of the R. F. C. obligation had been postponed until maturity as the Court said:

> "Though the R. F. C. (Holder of the bonds) has never approved (nor disapproved) the transfer, the bill does not allege that it refused to approve it or would not accept the State's payment in full of the amount of the indebtedness which the Governor was proceeding to make under the Act No. 418, supra, when stopped by this proceeding. We presume therefore that the R. F. C. would accept full payment of it as contemplated by the Governor, and, indeed, exhibits to the bill seem to indicate that the bonded debt may be paid before maturity.

"The University is in possession under its purchase, and the bonds would have been paid but for this proceeding. The University was bound as a purchaser to pay the purchase price, which was to assume certain burdens of the County, ultimately involving full payment of the bonds out of the Hospital revenues. Discharge of the bonds was planned to be paid forthwith, so that no approval by R. F. C. would have been necessary. The University was bound on December 20, 1944, subject to the approval of the R. F. C., which approval was necessary only if the cash was not paid. But under authority of Act No. 418, it was arranged to pay the cash and, therefore, the absence of approval by the R. F. C. should not be considered as an impediment in the way of declaring that the whole situation created an outstanding debt such as contemplated by that Act. The occurrences up to that time created a status which did not prevent it from being such in an equitable sense, made in good faith, not as a subterfuge to make it seem so, merely to create what would appear to be sufficient to qualify under the Act."

I trust this is sufficient response to your interrogatories.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 24, 1946.

Hon. Charles W. Terry, Director,
State Personnel Department,
Montgomery, Alabama.

Code 1940, Tit. 55, §§ 317, 327—Merit System—Political Contributions—Classified Service.

1. Employees in the State Classified Service are forbidden to contribute to the fund raising campaign for the National Democratic Executive Committee, or to solicit such contributions or subscriptions, under penalty of conviction for a misdemeanor and forfeiture of employment.

2. Persons outside the State Classified Service are forbidden to solicit such contributions from members of said Service, under penalty of conviction for a misdemeanor.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of September 23, 1946, is as follows:

"Your attention is directed to that part of Article 317, Chapter 9, Title 55 of the Code of Alabama, which provides as follows:

"'No employee in the classified service, and no member of the Board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription, or contribution. No person shall solicit any such assessment, subscription, or contribution of an employee in the classified service . . . Any officer or employee in the classified service who violates any of the foregoing provisions of this section shall forfeit his office or position'.

"Your official opinion is requested on the following questions:

"1. Does this section of the law make contributions to the National Democratic Committee an illegal act on the part of employees in the State classified service, thereby causing forfeiture of their office or position?

"2. Does it prohibit State employees in the classified service from actively participating in a fund raising campaign for the National Democratic Executive Committee?

"3. May persons other than those in the classified service solicit assessments, subscriptions, or contributions from employees in the State classified service?

"These questions have arisen during the current fund raising campaign for the National Democratic Executive Committee; hence an early reply will be appreciated.

The answer to questions numbered 1 and 2 is yes; to question numbered 3 the answer is no.

Section 317, to which you refer as Article 317, of Chapter 9, Title 55 of Code 1940, is as follows:

"§ 317. Political activities prohibited.—No person shall be appointed or promoted to, or demoted or dismissed from, any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affliations. No person shall seek or attempt to use any political endorsement in connection with any appointment to a position in the classified service. No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for any consideration. **No employee in the classified service, and no member of the board shall, directly or indirectly, pay or promise to pay any assessment, subscription, or contribution for any political organization or purpose, or solicit or take part in soliciting any such as-**

sessment, subscription or contribution. No person shall solicit any such assessment, subscription, or contribution of an employee in the classified service. No employee in the classified service shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. Provided, however, nothing herein shall prohibit any person in the classified service from serving out the terms of a party office for which he had been elected at the time this chapter goes into effect. Any officer or employee in the classified service who violates any of the foregoing provisions of this section shall forfeit his office or position." (Italics Supplied)

Section 327 of the same Title and Chapter, declares a wilful violation of any of the foregoing provisions to be a misdemeanor, and further provides that any person convicted thereunder "shall, for a period of five years, be ineligible for appointment to or employment in a position in the state service, and if he is an officer or employee of the state, shall forfeit his office or position."

In view of the plain and unambiguous language of these two sections it is difficult to understand on what theory it could be contended that they do not apply to "the current fund raising campaign for the National Democratic Executive Committee." The language is too plain and unambiguous to require or admit of judicial construction or interpretation. **L. & N. R. Co. v. Western Union Telegraph Co.,** 195 Ala. 124; **State v. Praetorians,** 226 Ala. 259; 59 **C. J.** 995; **Holt v. Long,** 234 Ala. 369, 174 So. 759, 760; **Hattemeyer v. State Tax Comm.,** 235 Ala. 44, 177 So. 156, 158(3,4); **Board of Education of Jefferson County v. State,** 222 Ala. 74(14), 131 So. 239.

The obvious legislative intent to be gathered from Section 317, supra, was to create a "merit" as distinguished from a then prevailing "spoils" system for the administration of the State's business and affairs, to divorce such system from the pressures and importunities of shifting political campaigns and agitations, and to create and protect a disinterested body of State employees free and independent of political pressure from the outside, secure in the tenure of their employment, the one factor of which was to be competency and ability of those employed, without consideration of party or religious affiliations or sympathies. Such a policy no doubt commended itself to the legislature as a distinct forward step in government.

Likewise and equally apparent from the positive and unqualified expressions of the statute and as an essential feature of that policy persons so employed were forbidden either to make voluntarily or to solicit from others "any assessment, subscription, or contribution for any political organization or purpose." Their divorcement from political activity and exertion must of necessity be complete if the integrity of the system is to be preserved. These provisions are vital to its existence.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

September 25, 1946.

Hon. Frank O. Deese,

Judge of Probate,

Dale County,

Ozark, Alabama.

Acts 1945, p. 330—Hospital Associations—

1. A hospital association formed under Act No. 211, S. 107, approved July 7, 1945, is without power to "encumber" or pledge the revenues of a county joining in the formation of such an association.

2. County governing bodies joining in the formation of such an association, while authorized to appropriate funds to the association, are not required to do so, and in the event of failure to make such appropriations they merely lose representation on the board of directors of the association.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion, bearing date of September 21, 1946, is as follows:

"Referring to Section 12, pages 334-335, General Acts of Alabama, 1945, I desire your opinion as to whether a County Hospital Association, organized under the provisions of this act, would have authority to encumber the revenues of the county?

"Also, under Section 13, same Act, would it be imperative on a county governing body to make appropriations for the purposes set out therein on demand of a County Hospital Association?"

I find nothing in the Act to which you refer (Act No. 211, S. 107, approved July 7, 1945—Gen. Acts 1945, p. 330) making it "imperative" or obligatory on a county governing body to appropriate county funds to "hospital associations" formed thereunder.

Such associations are to be formed by "one or more **local governing bodies located in the same or contiguous counties** (sic) within a zone determined by the State Board of Health as a zone for public hospitals." (§ 9, p. 332.) The limits, boundaries and area of such zones are to be fixed and determined by the State Board of Health, without reference apparently to counties, and their area 'may be revised from time to time as conditions change." (§ 3, p. 331.)

Whether the words "local governing bodies" as used in Section 9 and elsewhere in the Act include both municipal and county "governing bodies"

it is unnecessary to consider or determine. In any event the Act while authorizing them to form hospital associations by joint action, does not require them to do so. And, after the formation of an association, "if at any time a local governing unit shall cease to give financial support to a hospital association as required by the rules and regulations such governing body shall lose all seats on the board of directors." (§ 10.)

Section 13 of the Act authorizes "the governing bodies of each local political subdivision involved" to appropriate funds, "as determined upon by agreement between the executive committee of the association and the State Board of Health" for the construction, maintenance, equipment and operation of hospitals, but does not require them to make such appropriations. The only penalty for default in making appropriations, even after agreement, would seem to be loss of representation on the board of directors.

It necessarily follows that an association formed by a county under the Act is without power "to encumber the revenues of the county." Such encumbrance may be created, if at all, by the county governing body itself, assuming that a county governing body is authorized to join in forming an association, or itself exclusively to form one.

Yours very truly,

WILLIAM N. McQUEEN,

Attorney General.

INDEX

Quarterly Report, Attorney General

Volume 44

July 1, 1946 Through September 30, 1946

Page

ACTS (GENERAL AND LOCAL)

GENERAL ACTS 1939:

Page 1064, Section 10(c) 21

GENERAL ACTS 1945:

Page 330 44
Page 414 7
Page 479 8
Page 660 39
Page 734 28

LOCAL ACTS 1911:

Page 274 5

BALLOTS:

Special election to fill unexpired term—Regular election held at same time—Use of single ballot 26

CODE OF ALABAMA 1923:

Section 7167, as amended 10

CODE OF ALABAMA 1940:

TITLE 7:

Sections 964, et seq. 5

TITLE 8:

Section 51 12
Section 107 12

TITLE 10:

Sections 124, et seq. 10

TITLE 11:

Section 34 5

INDEX

(Continued)

Page

TITLE 17:

Section 148 26
Section 155 26

TITLE 31:

Sections 35, et seq. 5
Section 45 5

TITLE 36:

Section 78 27

TITLE 45:

Section 211 33
Section 219 33

TITLE 51:

Section 2(k) 10
Section 300 23
Sections 307, 308, 309 23
Section 412 16
Section 697 27
Section 703 27

TITLE 55:

Section 317 41
Section 327 41

CONSERVATION, DEPARTMENT OF:

Game wardens—Search of game bags—Hunting coats, etc. 12
Inspection of game bags—Authority to promulgate rules allowing 12

CONSTITUTION 1901:

Section 5 12
Section 94 15

COSTS AND FEES:

Mobile Inferior Civil Court—Sheriffs—Fees—Unlawful retainer proceedings 5

COUNTIES:

Hospital associations formed under Gen. Acts 1945, p. 330, without power to encumber revenue of county joining in forming association 44

INDEX

(Continued)

Page

Hospital associations formed under Gen. Acts 1945, p. 330—County not required to make appropriation to 44
Quick freeze plants—Not authorized to contribute or build 15
Veterans—Incompetent indigent—Conveyance to U. S. Veterans Hospital—Liability for expense of 33

COURTS OF COUNTY COMMISSIONERS:

Hospital associations formed under Gen. Acts 1945, p. 330—County not required to make appropriation to 44
Hospital associations formed under Gen. Acts 1945, p. 330, without power to encumber revenue of county joining in forming association 44
Quick freeze plants—Not authorized to contribute or build 15
Veterans—Incompetent indigent—Conveyance to U. S. Veterans Hospital—Liability of county for 33

DEPARTMENT OF REVENUE:

Income tax—Waiver—Works for benefit of both taxpayer and State 16
Income tax—Waiver executed at request of State—Final determination—Refund of overpayment 16

ELECTIONS:

Special election to fill—Unexpired term—Regular election held at same time—Use of single ballot 26

EMPLOYEES' RETIREMENT SYSTEM:

State department heads—Eligibility for membership 28

GOVERNOR:

Alabama Polytechnic Institute—Authorized under Acts 1945, p. 660, to appropriate funds to retire bonded indebtedness 39

INCOME TAX:

Waiver—Works for benefit of both taxpayer and State 16
Waiver—Executed at request of State—Final determination—Refund of overpayment 16

INFERIOR COURTS:

Mobile—Inferior Civil Court—Sheriffs—Fees—Unlawful retainer proceedings 5

INDEX

(Continued)

Page

INSANE PERSONS:

Veterans—Incompetent indigent—Conveyance to U. S. Veterans Hospital—Liability of county for 33

LABOR:

Unions—City may require policemen not to be member of 36
Unions—Municipalities—May not contract with 36

LICENSES:

Municipal corporations—State and county fairs 10
Trailer—Semi-trailer—Computation of amount 27
Trucks—Based on manufacturer's rated capacity 27

MERIT SYSTEM:

Employees in classified service—Political contributions—Cannot make to National Democratic Executive Committee 41
Persons outside classified service—Political contributions—Cannot solicit from members of said service 41

MOBILE COUNTY:

Inferior Civil Court—Sheriffs—Fees—Unlawful retainer proceedings 5

MOTOR CARRIERS:

Operating under Section 10(c) of Motor Carrier Act of 1939—May not transport general public 21

MOTOR VEHICLES:

Trucks—License—Based on manufacturer's rated capacity 27
Trailer—Semi-trailer—License—Computation of 27

MUNICIPALITIES:

Labor unions—May not contract with 36
License taxes—State and county fairs 10
Policemen—Labor union—May be required not to be member of 36

PUBLIC SERVICE COMMISSION:

Air photography—Crop dusting—Skywriting—Aerial survey—Aircraft used in not subject to regulation of 7
Aircraft ambulance—Subject to regulation of 7
Carriers operating under Section 10(c), Motor Carrier Act 1939—May not transport general public 21

INDEX

(Continued)

Page

REDEMPTION:

Partial—Holder of judgment against specific property not covered by tax sale 23
Partial—Where part of tract has sold to city for street improvements 23

SCHOOLS:

Alabama Polytechnic Institute—General Acts 1945, p. 660, authorizes Governor to appropriate funds to retire bonded indebtedness 39
Teachers—Physical examination for tuberculosis 8

SHERIFFS:

Mobile Inferior Civil Court—Fees—Unlawful retainer proceedings 5

TAXATION:

Income tax—Waiver—Works for benefit of both taxpayer and State 16
Income tax—Waiver executed at request of State—Final determination—Refund of overpayment 16
Municipalities—State and county fairs 10
Partial redemption—Where part of tract has sold to city for street improvements 23
Redemption—Holder of judgment against specific property not covered by tax sale 23
Trailer—Semi-trailer—License—Computation of 27
Trucks—License—Based on manufacturer's rated capacity 27

TAX SALES:

Partial redemption—Where part of tract has sold to city for street improvements 23
Redemption—Holder of judgment against specific property not covered by tax sale 23

TEACHERS:

Physical examination for tuberculosis 8

VETERANS:

Incompetent indigent—Conveyance to U. S. Veterans Hospital—Liability of county for 33

WORDS & PHRASES:

"Air Commerce" 7